No. 80735-3

No. 24565-9-III (Consolidated with 25187-0 III)

SUPREME COURT OF THE STATE OF WASHINGTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, AND CHARLES CABLE

Plaintiffs-Respondents

v.

FLUOR FEDERAL SERVICES, INC.,
a Washington corporation,

Defendant-Appellant

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Carrie L. Runge)

CERTIFICATION TO SUPREME COURT BY COURT OF APPEALS

RESPONDENTS' ANSWER TO AMICUS CURIAE
(corrected)

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I. INTRODUCTION

When faced with imminent harm, these pipe fitters put the safety of their coworkers and the protection of the environment ahead of their jobs. They were fired, and then those who supported them were fired by a vindictive employer who thought that owing to its close relationship with DOE it would never be held accountable. Fluor was held accountable by a Washington jury. The respondents are brave—to some they are heroes. Not just because they acted bravely in a dangerous situation, but because they continued fighting Fluor to the end, and in doing so, proved that government contractors can be held accountable at Hanford. Their actions have protected the public and will continue to protect the public by encouraging other Hanford whistleblowers to stand up for safety and the environment. As will be discussed, they protected unique state policies which are not present in the ERA and they left a forum that was inadequate as a matter of fact. The jury verdict should be affirmed in all respects.

II. ANALYSIS

A. The Best Evidence That The DOL Forum Is Inadequate In Fact Is That Fluor's Most Egregious Retaliation Occurred After The Pipe Fitters Returned To Work Following A DOL Settlement Under The ERA

In support of the argument that the DOL forum is adequate, the WDTL amicus tout the ERA as having an "incredible breadth" of remedies. WDTL Brief at 13. Except for later stage appeals, those remedies are awarded through the administrative processes of the Department of Labor. On its face, those remedies do seem compelling, but if we as a people intend that our living and breathing citizens should protect important public policies when our corporate citizens do not, then the adequacy of a particular remedy must be evaluated on whether it achieves the objective of protecting the public in fact not in on its face.

The pipe fitters agree with the WSTLA amicus that the wrongful discharge claim is ground in deterring companies from harming the public interest. See WSTLA Brief at 4. So it is relevant to the "adequacy of the alternate remedy" analysis whether a particular forum actually deters an employer from acting against the public interest. Fluor's conduct in this

case demonstrates that the ERA is not an adequate remedy when one looks beyond the face of the legislation.[1]

As the contract holder of the main contract with DOE, Fluor was a bully at Hanford and created a culture of fear in the workforce. Yet, trade employees like the pipe fitters desperately wanted to work there because they could avoid the usual periods of extended travel and unemployment between jobs associated with life as a pipe fitter, and enjoy good benefits and year-long employment. Brundridge Response at 2-3. At Hanford, employees were even carried between jobs because they were highly trained and it was more cost effective to carry them than to pay to train a new employee. Brundridge Response at 15.

On threat of termination, Fluor used the desire for stable employment as a lever to keep employees from raising safety concerns that slowed job progress. It was well known at Hanford that if you want to keep your job keep your mouth shut. RP 1587. Randy Walli would not keep his mouth shut.[2] He reported safety violations and worked to keep

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[1] This is in addition to the other problems already detailed to the court and outlined in the documents attached as Appendix 1.

[2] Although the trial court excluded most of the evidence related to Pipe Fitter I that related to the safety and the potential environmental harm that could have occurred but for the pipe fitter's refusal to install the underrated valve, the trial court did permit admission of Trial Exhibit 21, which is the OSHA letter to Fluor stating its findings from the Pipe fitter I OSHA investigation. It was redacted to delete opinions.

his crew safe in an unsafe environment.[3] Owing to his willingness to express his concerns, a Fluor representative referred to him sarcastically as "Mr. Safety." Appendix 2 at 2. Later, when Mr. Walli and his crew refused to install the underrated valve because they feared the valve might explode and cause harm to the workers and the environment, Manager Dave Miller came to the work site and cursed at them. Appendix 2 at 2. Mr. Walli and his crew attempted to work with management, but ultimately held their positions until Fluor agreed to install the proper valves. Appendix 1 at 2. The entire crew was laid off one week later.[4] Appendix 2 at 2.

Mr. Walli and his crew filed complaints under the ERA which were investigated by OSHA. The OSHA investigation culminated in a finding favoring Mr. Walli and his crew ("Pipe fitter I"), but Fluor appealed and then settled the case just before trial giving each complainant $42,000 and a promise of reinstatement. Appendix 3.

Fluor was undeterred by the ERA/OSHA process and result. Rather than embracing the need to work safely, even if it costs money, and the concept that intimidation and retaliation are unacceptable at Hanford,

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[3] He was hospitalized from breathing in carbon monoxide because he and his crew were not provided with proper respirators. Appendix 2 at 1.

[4] After the layoff, General foreman Nichols told Plaintiff Dave Faubion that, "Miller manipulated the schedule to get rid of all those guys for safety because he was tired of all the safety stuff they brought up. And he used –[a]nd he used Doug Holbrook as a pawn to get rid of Randy Walli." RP 1235.

especially as it relates to ensuring a safe environment, Fluor was invigorated by the settlement and motivated to escalate the retaliation.

Fluor Manager Foucault lied to the workforce saying that the "federal mandate" of the settlement required that Fluor layoff seven working pipe fitters for the seven returning pipe fitters. Brundridge Response at 15. Foucault also told his managers that the returning pipe fitters could not be laid off for six months. Brundridge Response at 15. Fluor proceeded to layoff seven pipe fitters who were vocal supporters of Pipe fitter I (referred to as "Pipe fitter II") and Miller threatened to rip off the balls of Superintendent Ivan Sampson if he told anyone that they did not have to lay off seven because there was work. Brundridge Response at 16.

Pipe fitter II filed ERA complaints soon after they were laid off. Pipe fitter Dave Faubion had worked as a welder at Hanford without a gap in employment since 1974. RP 1217. But after learning from General Foreman Nichols that the Pipe fitter I termination was intentional retaliation, he decided to carpool with Randy Walli after he was reinstated pursuant to the terms of the settlement agreement. Brundridge Response at 17. He was laid off 30 days later. RP 1238. Fluor was undeterred and was sending a message—if you fight us you will lose your jobs no matter who you are. Six months later Fluor laid off Pipe fitter I (referred to in

this layoff as "Pipe fitter III"). Fluor laid off Foreman Chuck Cable after he testified truthfully at a deposition. Brundridge Response at 17. Again, Fluor was undeterred. And as discussed in earlier briefing, Fluor abused the administrative forum and played games with the rules without consequence. Appendix 1.

Even though the Department of Energy is in charge of the site, no one from DOE or DOL intervened to protect Pipe fitter II or III. Through all of this Fluor was undeterred, perhaps in part because DOE takes sides in whistleblower cases at Hanford—they take the side of the employer because they are bound by contractual obligations in that regard.

B. At Hanford, The Department Of Energy Is Aligned With The Contractor In Whistleblower Litigation Leading To Distrust Of The Federal Administrative Forum

The adequacy of the ERA remedy is also diminished at Hanford because of the perception that the federal government will not protect whistleblowers because it has a conflicting obligation to defend and to financially support those contractors who retaliate against whistleblowers. If there is only a federal remedy at Hanford, many whistleblowers will remain silent because they perceive that DOE will hurt them and help the retaliating contractor.

During the civil litigation, DOE refused to produce documents pertaining to its conversations with Fluor managers about the pipe fitters. At summary judgment, DOE attorney Robert Carosino submitted a declaration explaining the refusal, which was based on the fact that DOE paid Fluor's costs in defending the litigation and claimed privilege on the basis of "common interest." Appendix 4.

Superintendent Ivan Sampson was deposed in the litigation. At trial, Sampson also testified as follows regarding his own experiences with DOE.

> And from what I remember, in that room was Dave Foucault, Tim Cook -- and I put and/or Walt Ray -- and Bill Stewart. And I opened the door, and Tim Cook came to the door. He was another superintendent. I told him that I needed to talk to Bill Stewart. And he says, say, Ivan, we're busy right now. We had someone call DOE. And I said, what's going on? He said, we're listening to the recording from DOE, trying to figure out who made the call.

RP 538. This was clearly a whistleblower call to the DOE Hotline and someone at DOE had provided a DOE Hotline tape to Fluor. Workers are supposed to be able to call the DOE Hotline anonymously, but Mr. Sampson testified that it was understood in the workforce at the time that DOE had installed caller ID so persons would be identified if they called anonymously. RP 491. Worse, when Mr. Sampson did go to DOE Employee Concerns to discuss his mistreatment after he testified at a

deposition in this case, he was shocked to find that Fluor's attorney was present at the meeting, which made him feel extremely intimidated. RP 500-1. Fluor was undeterred.

The DOE's active support of Fluor and other contractors who retaliate at Hanford makes it imperative that we, the citizens of Washington, provide an alternative forum so that whistleblowers who distrust the executive branch of the federal government, will perceive they have a remedy in state court.[5] Unlike any other forum, here a whistleblower could easily perceive that going to DOE to complain is going to the contractor and that going to the DOL to vindicate ones rights is going to the same branch of government that is working with the contractor against whistleblowers.

C. The Federal Administrative Forum Under The DOL Has Serious Flaws That Prevents It From Being Adequate

On May 15, 2007, Professor Richard E. Moberly testified before the Subcommittee on Workforce Protections Committee on Education and Labor, United States House of Representatives Hearing on *Private Sector*

[5] Aiding the perception that the federal government will not treat whistleblowers fairly is the fact that appeals of ALJ decisions go to the Secretary of Labor, who is appointed by the President like the Secretary of Energy, and the Secretary has delegated that authority to the Administrative Review Board (ARB), which is "composed of three members, each of whom is appointed by the Secretary for terms of two years or less and is subject to removal by the Secretary. Willy v. ARB, 423 F.3d 483, 491 (5th Cir. 2005)(citations omitted).

Whistleblowers: Are There Sufficient Legal Protections? Appendix 5. In that testimony he outlined significant flaws in the administrative process under the DOL and OSHA. He noted that:

> Despite the importance of protecting whistleblowers from retaliation, no uniform whistleblower law exists. Rather, protections for private sector whistleblowers consist of a combination of federal and state statutory protections, as well as state common law protections under the tort of wrongful discharge in violation of public policy. These uneven protections are often rightly labeled a "patchwork," because of the wide variance in the scope of protections each provides.

Appendix 4 at 2. In his testimony, he detailed a variety of procedural and substantive hurdles in the patchwork of federal remedies that diminishes the effectiveness of the protections. His analysis provides further evidence in support of Respondent's position that the forum is not adequate as a matter of fact.[6]

D. Washington Policies Protecting The Environment Are Broader Than Federal Policies And Place Responsibility For Protecting The Environment On Each Individual

The WDTL amicus brief cites the ERA as the policy at issue here with its primary focus on protecting health and safety from the inherent

[6] In Respondent's December 2007 reply in the motion for clarification, respondents attached Professor Moberly's recent law review article which delineates the flaws in the DOL system in more detail. *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis Of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. (Forthcoming 2007).

risks of nuclear power. WDTL Brief at 4. But this is not the policy at issue and it is distinct from Washington policies.

At the trial court, the pipe fitters relied on several state policies including the State Environmental Policy Act (SEPA), which provides:

> The purposes of this chapter are: (1) To declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

RCW 43.21C.010. Whereas the ERA simply seeks to protect safety and health from nuclear power, SEPA seeks to protect the environment and mankind more broadly.

This Court has already recognized the public policy behind SEPA is stronger than that behind the National Environmental Policy Act (NEPA). Kucera v. State, Dept. of Transp., 140 Wash.2d 200, 224, 995 P.2d 63 (2000). For our purposes, SEPA is even stronger and more distinct. SEPA grants to every Washington citizen a fundamental right to a healthful environment and places responsibility for protecting the environment on every citizen of Washington individually.

> The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to

> contribute to the preservation and enhancement of the environment.

RCW 43.21C.020(3). The ERA and other federal legislation do not grant Washington Citizens such a right nor do they obligate Washington citizens to take action to protect the environment as does SEPA. Accordingly, this Court should conclude that the ERA does not protect the State policies set out in SEPA and other state legislation.

E. Jeopardy Is And Must Remain An Issue Of Fact For The Jury When Facts Are Present Calling The Adequacy Of Any Forum Into Question

WSTLA amicus agrees with the Respondents that the adequacy of the alternative remedy is a question of fact for the jury. And this makes sense. The SEPA legislative mandate places on every Washington citizen the responsibility to contribute to the preservation and enhancement of the environment. Each person who vindicates the policies outlined in SEPA and in other related Washington statutes and is then wrongfully discharged for doing so, will naturally seek the forum that provides the best opportunity to obtain relief balanced against issues such as money and time. The choice to litigate in State court will undoubtedly be a last resort because state court is expensive and may take a long time to obtain justice, as opposed to administrative forums, which, if they work, often are fast and inexpensive. *Compare generally*, Martini v. Boeing, 137 Wash.2d

357, 376, 971 P.2d 45 (1999) (no incentive to quit and sue owing to burdens of civil litigation).

As this case demonstrates, in a given instance, a victim of retaliation may correctly perceive that a particular forum is inadequate before or after seeking to utilize that forum. That perception based on facts and experience ought to be left for a jury to evaluate and appellate courts to review. Otherwise, we risk forcing our citizens into forums that are inadequate as a matter of fact and which do not vindicate Washington policies, because either a court has proclaimed a forum safe for all time, when it may not be adequate at a particular moment in time, or a court has not spoken on the adequacy of a forum and the victim cannot afford to litigate and later find that years later an appellate court thinks the forum was adequate on the face of an untested statute. If that is permitted to happen, we the Bar, become the impediment to vindicating important state policies.

F. Like Ellis, Given The Imminent Harm To The Public, The Court Should Rule That Jeopardy Is Established Here

Like David A. Ellis, these pipe fitters acted to protect themselves and the public from potential imminent harm. They had little time to think about their actions. They either installed the valve to save their jobs or they refused and were fired. They stood up for safety and for the

environment and they suffered for years. In contrast, Steven M. Korslund was terminated after he raised questions about his employer's conduct with regard to safety, mismanagement and fraud. Korslund v. Dycorp Tri-Cities Services, Inc., 121 Wash.App. 295; 302-4, 88 P.3d 966 (2004) ("Korslund I). There is nothing in the opinion that finds imminent harm.

In Ellis v. City of Seattle, 142 Wash.2d 450, 461, 13 P.3d 1065 (2001), the Court rewarded Mr. Ellis by creating a rule that if one acts reasonably in a situation involving imminent harm, jeopardy is proven. The Court did not engage in an "alternative remedies" analysis, nor would that have been appropriate. As a matter of public policy, we want citizens who put their careers on the line to save us from imminent harm to have a streamlined approach to proving wrongful discharge. This provides added deterrent effect for employers who would punish those who stand up for us in the most severe situations.

G. Waiver Should Be Applicable Because Fluor Excluded All Evidence Except Trial Exhibit 21 (Redacted)

Fluor obtained a great benefit by excluding most of the Pipe fitter I evidence since it did not challenge clarity or jeopardy, and had its attorney not filed the CR 60 motion post-trial, virtually none of that evidence would be before the Court now. Fluor did not adequately raise the issue below, and should not be allowed to raise the issue now.

III. CONCLUSION

For the reasons set forth above, the motion should be granted.

Respectfully submitted this 11th day of January, 2008.

THE SHERIDAN LAW FIRM, P.S.

By: /s/
John P. Sheridan, WSBA #21473
Attorneys for Respondents

DECLARATION OF SERVICE

John P. Sheridan states and declares as follows:

I am over the age of 18, am competent to testify in this matter, am a Paralegal at the Law Office of John P. Sheridan, P.S., and make this declaration based on my personal knowledge and belief.

2. On January 14, 2008, I caused to be delivered via email and hand delivery (as noted below) addressed to:

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a copy of RESPONDENTS' CORRECTED ANSWER TO AMICUS. This version adds tables of contents and corrects typographical error and a misstatement on page 12 of the brief deleting the word, "raises" and adding the word, "finds," and on page 13 adding the word, "adequately." Also, it should be noted that counsel has been out of town and had technical difficulties associated with the location which prevented copies of the original pleading from being delivered electronically to some parties until Saturday (including Messrs. Estes, Pond, Locker, Wing, and Fletcher). This product is being sent to all recipients.

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14th day of January, 2008, at Orlando, Florida.

/s/
John P. Sheridan

Appendix 1

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DATE: August, 18, 1999

CASE NUMBER 1999-ERA-18

In the Matter of

RANDALL WALLI, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, and JAMES STULL,

COMPLAINANTS,

v.

FLUOR DANIEL NORTHWEST, INC.,

RESPONDENT.

ORDER DENYING REQUEST FOR STAY

The above-captioned matter arises from a complaint filed on February 25, 1999 under the provisions of section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851. In brief, the complainants allege that the respondent violated the provisions of section 211 by laying them off from their jobs and otherwise diminishing their opportunities to be employed as pipefitters at the Department of Energy's Hanford (Washington) Nuclear Site. In an Order issued on May 25, 1999 it was directed that all discovery concerning this matter be completed by August 6, 1999 and that a trial on the merits would commence on September 27, 1999. On August 5, 1999, the five complainants in this matter and all four complainants in a similar matter now pending before Administrative Law Judge Alexander Karst jointly filed a civil action in a Superior Court for the State of Washington alleging that the discriminatory conduct alleged in these two matters also violated the laws of the State of Washington.[1] Six days later, these same complainants filed motions requesting that all proceedings in this matter and the matter pending before Judge Karst be stayed until the conclusion of the parallel state court proceeding. On August 16, 1999, the respondent filed a reply strongly opposing these motions.

[1]The matter pending before Judge Karst involves four other complainants and was filed in 1998. For various reasons, including discovery disputes, the trial of that case has been postponed three times. A fourth trial date has not yet been established.

ANALYSIS

All parties appear to agree that the complainants' stay request is governed by the standards set forth in the Supreme Court's decisions in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), and Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1982).[2] In the Colorado River decision, the Supreme Court observed that federal courts have a "virtually unflagging obligation" to exercise their jurisdiction and that abdication of this obligation can be justified "only in the exceptional circumstances" where it "would clearly serve an important countervailing interest." 424 U.S. at 813, 817. Further, the Court held that although there may be exceptional circumstances where considerations of judicial economy make it appropriate to dismiss or stay a federal court action so that the matter in dispute can be resolved in a pending state court action, any such determination can be made only after considering a variety of factors. 424 U.S. at 818. Among these factors, the Court held, are (1) whether one court has assumed jurisdiction over particular property, (2) the inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation, and (4) the order in which jurisdiction was obtained by the concurrent forums. Id. In the Cone decision, the Court observed that the weight to be given to the various factors may vary greatly from case to case, but that when weighing such factors the balance is "heavily weighted in favor of the exercise of [federal] jurisdiction." 460 U.S. at 16. The Court also identified two additional factors that should be considered: (5) whether federal law provides the rule of decision on the merits, and (6) whether the state court proceeding are inadequate to protect the rights of the federal litigant. 460 U.S. at 23, 26. In Cone, the Court also observed that "when a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties" and added that if there is "any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all." 460 U.S. at 28. In subsequent decisions, the Ninth Circuit has identified a seventh relevant factor: the discouragement of forum shopping. American International Underwriters (Philippines), Inc. v. Continental Insurance Company, 843 F.2d 1253 (9th Cir. 1988).

In this case, the complainants contend that the first two Colorado River factors are inapplicable but that the remaining two Colorado River factors favor granting a stay. In addition, the complainants assert that a stay should be granted because the state court proceeding will be resolved sooner and will take place in a forum that has the authority to enforce procedural requirements with sanctions that are beyond the authority of administrative law judges. As well, the complainants contend, the action in the state court will enable them to use subpoenas to obtain relevant evidence from third parties who cannot be compelled to testify in this proceeding. Such evidence, the complainants assert, is of crucial importance in this case and is likely to be in the possession of as many as seven subcontractors who are involved in on-going contractual relationships with the respondent and its corporate parent. In contrast, the respondent contends that all six factors

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[2]See Hoffman v. Bossert, 94-CAA-4 (Sec'y Nov. 20, 1995)(noting that the standard for deciding whether to stay an administrative action is the same as the standard applied to requests for stays of district court actions).

identified in the Colorado River and Cone decisions support denial of the complainants' stay request. The respondent also disputes the contention that the state proceeding will be resolved any sooner than this proceeding and contends that administrative law judges have sufficient authority to enforce their procedural orders. In addition, the respondent contends that the complainants' alleged need to use compulsory process to compel the production of evidence from the third-party subcontractors is a mere "pretext."

After fully considering the arguments of the parties, it has been determined that it would be legally impermissible to grant the stay requested by the complainants. There are three reasons for this determination.

First, of the six factors identified as relevant by the Supreme Court, three are inapplicable, one strongly favors denial of the complainants' request, and two involve a variety of considerations which, on balance, weigh against granting a stay. In particular, factors one (jurisdiction over particular property), two (inconvenience of the federal forum), and six (ability of the state court to protect the rights of the parties) are clearly inapplicable and factor five (whether federal law provides the rule for decision) strongly favors denial of a stay. Moreover, although evaluation of the two remaining factors (avoidance of piecemeal litigation and the order in which the parallel actions were commenced) is somewhat more complex, in the final analysis these factors also must be viewed as favoring denial of the complainants' request. For example, although it might appear that granting a stay would avoid piecemeal litigation by allowing this entire matter to be resolved in the state court litigation, in fact this result would be likely to occur only if the complainants were to fully prevail in the state court proceeding. In contrast, if the complainants were to lose in the state court they would still presumably be able to resume their action in this forum by pointing out that, because of the differences in the burden of proof in the two proceedings, the doctrines of collateral estoppel and res judicata do not apply.[3] This possibility is highly significant because, as previously noted, the Supreme Court specifically held in Cone that if there is "any substantial doubt" about whether a parallel state court action will result in a "complete and prompt" resolution of the issues between the parties, it would be "a serious abuse of discretion to grant the stay or dismissal at all." 460 U.S. at 28. It is also noted that the fact that the complainants have requested a stay rather than a dismissal in this action is a further indication that the state action will not result in a complete resolution of all the issues between the parties and even suggests an additional ground for denying the motion—the possibility of forum shopping. Likewise, examination of the order in which the parallel actions were commenced also supports denial of a stay. Although the Supreme Court noted in Cone that analysis of this factor involves more than simply examining the dates on which the relevant complaints were filed and should primarily focus on "how much progress has been made in the two actions," it is clear that neither type of inquiry favors granting a stay. Indeed, the record shows that the complaint in the state action was not filed until almost six months after the beginning of this proceeding and that

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[3]Indeed, the complainants seem to anticipate this possibility by specifically observing on page 9 of their motion that the burden of proof in this proceeding is different than the burden of proof in the state proceeding.

although the discovery process in the state action has only just begun, the discovery process in this proceeding is nearly complete.

Second, the complainants are unconvincing in asserting that the issues in this case are likely to be resolved substantially sooner in courts of the State of Washington than in this forum. Although it is true that the resolution of some whistleblower cases can be delayed for prolonged periods, materials submitted by the respondent indicate that there are delays of comparable length in obtaining judgments from the trial courts of the State of Washington. It is noted, moreover, that under recently-amended regulations, at least some remedies recommended in the initial decisions of administrative law judges must become effective immediately. See 29 C.F.R. §24.7(c)(2). The complainants are also unconvincing in asserting that administrative law judges lack sufficient authority to impose sanctions for violations of procedural orders. Although administrative law judges lack the power to fine or jail parties who fail to obey procedural orders, in almost every case the availability of other types of sanctions is more than adequate to ensure full compliance.

Third, although it appears that evidence which may be highly relevant to the issues in this case is in the possession of third-party subcontractors who cannot be compelled to testify or provide evidence in proceedings under section 211 of the Energy Reorganization Act,[4] this circumstance alone is insufficient to warrant a conclusion that all proceedings in this matter must be stayed pending a final resolution of the state court proceeding. Although the Cone decision directs that consideration be given to the adequacy of state court proceedings, nothing in either the Colorado River or Cone decisions indicates that there should be a converse inquiry into the adequacy of the federal forum's authority. Indeed, it could be argued that such an inquiry would amount to second guessing judgments already made by Congress.

In concluding, it is noted that although it would be impermissible to stay further proceedings in this matter until a final decision in the parallel state court action, there is apparently no prohibition against recognizing the fact that during the course of discovery in the state proceeding the parties to this case are likely to obtain otherwise unavailable evidence from the third-party subcontractors and that some of this evidence could be highly relevant to the issues in this proceeding. For this reason, it has been determined that the commencement of the trial of this matter should be postponed for at least six months so that the parties will have an opportunity to offer into evidence in this proceeding any relevant information that they may be able to obtain from these subcontractors during the course of discovery in the state proceeding. Such evidence, for example, may be found in the deposition testimony of employees of the third-party subcontractors or in documents obtained from these subcontractors in response to state court subpoenas. Formal notice of the new trial date will be issued following a conference call which will be held in the near future for the purpose of determining the availability of attorneys and witnesses.

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[4]A detailed analysis of the Department of Labor's lack of authority to issue subpoenas in whistleblower proceedings is set forth in a recent law review article. See Stephen Smith, *Due Process and the Subpoena Power in Federal Environmental, Health, and Safety Whistleblower Proceedings*, 32 U.S.F. L. Rev. 533 (1998).

This ruling has been arrived at in collaboration with Judge Karst, who will soon be issuing a parallel decision.

Paul A. Mapes
Administrative Law Judge

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DATE: December 17, 1999

CASE NUMBER 1999-ERA-18

In the Matter of

RANDALL WALLI, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, and JAMES STULL,

COMPLAINANTS,

v.

FLUOR DANIEL NORTHWEST, INC.,

RESPONDENT.

ORDER DENYING REQUEST FOR CONTINUANCE

The above-captioned matter ("Pipefitter III") arises from a complaint filed on February 25, 1999 under the provisions of section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. §5851. In an Order issued on May 25, 1999, it was determined that all discovery concerning this matter was to be completed by August 6, 1999 and that a trial on the merits would commence on September 27, 1999. On August 5, 1999, the five complainants in this matter and all four complainants in a similar matter assigned to Administrative Law Judge Alexander Karst ("Pipefitter II") jointly filed a civil action in a Superior Court for the State of Washington alleging that the discriminatory conduct alleged in these two matters also violated the laws of the State of Washington. Six days later, these same complainants filed motions requesting that all proceedings in both this matter and Pipefitter II be stayed until the conclusion of the parallel state court proceeding. This request was strongly opposed by the respondent. In August of 1999, Judge Karst and I issued separate orders which determined that although it would be impermissible to stay these matters until the conclusion of the state proceeding, it would nonetheless be appropriate to postpone the trial of these matters for at least six months in order to give the complainants the opportunity to conduct third-party discovery. In accordance with these rulings, on August 30, 1999, I issued a notice formally postponing the commencement of the trial of Pipefitter III until April 17, 2000. On the same day, I also issued a Revised Pre-Trial Order that extended the deadline for completing discovery until March 10, 2000.

On November 24, 1999, counsel for the complainants submitted a letter in which he requested that the trials of both Pipefitter II and Pipefitter III be postponed for an additional six months. As grounds for this request, it was asserted that the respondent's unsuccessful attempt to have the state case removed to a federal court had "prevented the development of the third party evidence." As well, it was noted that such discovery would be further delayed by the holidays, vacation schedules, and the trial of another case. On December 1, 1999 the respondent filed a response that "strongly" opposed this request. Among other things, the respondent alleged that the complainants have had more than enough time to conduct discovery and contended that any discovery delays are due to the complainants' "dilatory" conduct. The respondent also noted that the complainants have already taken "more than 41 depositions" in these two cases. Subsequently, additional letters concerning the merits of the continuance request were filed by the both complainants and the respondent.

From a review of the various documents submitted by the parties, it appears that although respondent's attempt to have the state case removed to a federal district court did not completely terminate the discovery process, it did at least temporarily interfere with the pace of discovery. However, I nonetheless conclude that the complainants have failed to provide convincing grounds for again postponing the trial of Pipefitter III. There are several reasons for this conclusion. First, even before the removal action was undertaken the complainants had completed an extensive amount of discovery (e.g., at least 41 depositions) and, for that reason, discovery against the respondent should have been in its final stages. Indeed, the initial Pre-Trial Order directed that all discovery be completed by August 6, 1999. Second, the knowledge obtained as a result of this extensive discovery should have made it possible for the complainants to have promptly formulated reasonably focused third-party discovery demands which could have been served on the concerned third parties as soon as the federal court denied the respondent's removal request, if not sooner. Third, although such discovery demands may not have yet been served on the third parties, if the complainants act promptly there is still adequate time for such demands to be served and fulfilled before the March 10, 2000 discovery deadline set forth in the Revised Pre-Trial Order. Fourth, the decision to extend the initial trial date by approximately six and one-half months reflected a recognition of the fact that by April 17, 2000 there would undoubtedly be vacations, holidays, proceedings in other cases, and legal skirmishes such as the respondent's attempt to have the state case removed to a federal court. However, it was concluded that the extension period was sufficiently lengthy to give the parties enough time for any such activities and all additional activities that would be necessary to complete the discovery process.

Finally, it is noted that Pipefitter II and Pipefitter III are separate, unconsolidated cases which have been given different docket numbers and assigned to different Administrative Law Judges. For this reason, all future pleadings and motions concerning these cases should be filed separately.

Paul A. Mapes
Administrative Law Judge

Appendix 2

U. S. DEPARTMENT OF LABOR

Occupational Safety & Health Administration
1111 Third Avenue, Suite 715
Seattle, Washington 98101-3212

Telephone: (206) 553-5930
FAX: (206) 553-6499

Reply to the Attention of: FSO/jrs

October 6, 1997

Mr. Stew Heaton, General Manager
Fluor Daniel Northwest, Inc.
B3-66, P.O. Box 1050
Richland, WA 99352-1050

Dear Mr. Heaton:

This is to advise that we have completed our investigation of the above-referenced complaint filed by Messrs. Terry Holbrook, Clyde Killen, Pedro Nicacio, Shane O'Leary, Daniel Phillips, James Stull, and Randall Walli, against Fluor Daniel Northwest, Inc. under the provisions of the Energy Reorganization Act, 42 U.S.C. Section 5851, as amended. The investigation revealed the following:

The workplace involved is the Replacement of the Cross-site Transfer System Project (also known as the W058 project) located within the Hanford tank farm area. The complainants, all pipe fitters, were employed at all times material herein by respondent, Fluor Daniel Northwest (FDNW), a so-called "enterprise company" subcontractor of Fluor Daniel Hanford, Inc., the Department of Energy's prime contractor for the Hanford site. All complainants are members of Local 598 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. The complainants and respondent are thus covered under the provisions of the Energy Reorganization Act of 1974, as amended.

Complainants assert that their employment was terminated in the form of a reduction in force in retaliation for having voiced numerous safety and health complaints to their employer. The complainants were all part of a pipe fitters crew which was working on the construction of a pipe six and a half miles long, designed to convey nuclear waste products. Work was being performed on both ends of the pipe, with the west end called "200 West" and the east end "200 East." Complainants worked at 200 West. The project began in November 1995, and by May 1997, the pipe was ready to be hydrostatically pressure tested to ensure the integrity of the pipe's welding. The project was scheduled to be fully completed by August 1997.

From the beginning of the project the complainants were involved in a number of safety and health related incidents. Several individuals on the crew complained of not having the proper respirators for "cad" welding. Some crew members experienced adverse symptoms from the fumes, and the crew foreman, complainant Walli, was hospitalized. An independent investigation revealed that the workers had been exposed to excessive levels of carbon monoxide and hydrofluorocarbons.

EXHIBIT 2

In the Spring of 1996, complainant Walli brought up safety concerns regarding a confined space issue. In the course of resolving the issue Mr. Walli was sarcastically referred to as "Mr. Safety" by a FDNW representative.

In March 1997, complainants Walli and Nicacio (who is also the local union president) met with the FDNW construction manager to express continuing concerns about the adverse relationship which had developed between the crew and their superintendent regarding safety issues.

In April 1997, complainants brought up several safety and health issues at the monthly safety meeting. Complainant Killen complained of possible X-ray overexposure due to the crew's proximity to X-ray testing of the pipe's welds. Complainant Walli expressed concern over the safety department personnel turning off their cellular phones during working hours, thus not being immediately available. Complainant Nicacio brought up an issue in which the safety department had classified an area as not being a confined space based on a telephone description by the construction superintendent rather than by performing an on-site determination. The following week the general foreman held a meeting with the pipe fitters crew to discuss the concerns. In that meeting the general foreman, Jerry Nichols, stated that the area manager, Dave Miller, had referred to the complainants as "grufling employees" and that Miller had asked Nichols to meet with them to resolve the issues.

On May 27, 1997, at a pre-job meeting the crew was informed that they were to install two test caps and two valves on the pipe in preparation for a hydrostatic test. Upon receiving the valves, the crew noticed that the valves were rated for 1975 psi, and the test was to be conducted at a pressure of 2235 psi. They were concerned that any failure of the valves could result in serious injury to themselves and anyone else who may be present in the relatively confined area of the pit and that accidental release of water would cause nuclear contamination of the area since some of the surrounding ground was known to be contaminated. The crew advised Foreman Walli of the under-rated valves, and Walli advised Assistant Superintendent Doug Holbrook. The crew was advised to hold off on installing the valves. The pipe fitters also learned that the company providing the valves, Apollo, Inc., also had two other valves available at the site, which were rated at 3500 psi.

During the next two days Area Manager Miller and others sought assurance from the valve supplier that the valves were safe for use. Respondent provided a letter dated May 28, 1997, from the supplier stating that the valves are, themselves, tested at a pressure 50% greater than the rated working pressure. Area Manager Miller did not feel comfortable with the response and requested further clarification which was provided and which stated more directly that the valves were acceptable for hydrostatic testing at 2235 psi. The complainants remained unconvinced, and in response, General Foreman Nichols arranged for the test to be conducted by employees of Apollo, Inc. The complainants agreed to install the valves on the condition that they would not be involved in the test. General Foreman Nichols thus thought that the issue had been resolved and so advised Area Manager Miller.

However, on the day of the test, May 30, 1997, the Apollo crew who was to perform the test did not possess the proper clearances to gain access to the tank farm. The complainants' crew was again

asked to conduct the test. Foreman Walli and complainants Killen, O'Leary and Stull remained on the job after normal work hours to conduct the test. Complainants again raised the issue of the under-rated valves. Foreman Walli advised the Apollo foreman that they would only perform the test if the properly rated valves, which Apollo had available, were used. After the Apollo foreman made some phone calls to secure permission to use the other valves, Area Manager Miller showed up on the job site. According to all witnesses, Miller was upset that the test was not progressing and used profanity toward the complainants. When he was told that the proper valves were, in fact, available, he ordered their use. The proper valves were then installed, and the test was successfully conducted without further incident.

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The following Tuesday, June 3, 1997, General Foreman Nichols advised Foreman Walli that there would be a layoff of pipe fitters. Nichols advised Walli of the names of employees initially selected for layoff which included complainants O'Leary, Stull, Killen, Holbrook, and Nicacio. Nichols further advised that Area Manager Miller also wanted Walli laid off but that he (Walli) would be removed as foreman and returned to the crew on a different project. Assistant Superintendent Doug Holbrook, who was also a pipe fitter, would be returned to foreman, replacing Walli. By Wednesday, June 4, complainant Nicacio was removed from the list and replaced by a T. Morgan. Area Manager Miller states that he decided to remove Nicacio from the list to avoid the appearance of discrimination because Nicacio had been vocal about safety issues during a safety meeting in March 1997. However, the general foreman also states that he substituted T. Morgan for Nicacio based on his consulting with Morgan's foreman, Charles Willoughby, who wanted to retain Nicacio.

On Thursday, June 5, complainants met with General Foreman Nichols and Union Steward Hank Tonning to express their concerns that they felt they had been selected for layoff as a result of their bringing up safety issues, particularly the incident involving the under-rated valves. Although the witnesses' testimony varies somewhat, it is consistent to the extent that General Foreman Nichols told the crew that the layoff was due to the job winding down, that the decisions of who to lay off had been made, and there was nothing further he could do about it. When pressed about why complainant Walli (crew foreman) was being removed and transferred, Nichols refused to answer. This response heightened complainants' concerns, and complainant Nicacio (who is also the union president) stated that he did not think that he could work under the conditions and "just let the whole thing go." Nichols then asked Nicacio if he was quitting. Nicacio responded by saying that under the circumstances Nichols could lay him off with the rest of the group. Walli and Phillips then also elected to be laid off, stating to Nichols that they did not want to quit, but could not continue working under the circumstances. General Foreman Nichols then asked the remaining two pipe fitters present if they wanted to leave, and they said they did not. On June 6, 1997, the complainants and an apprentice pipe fitter were laid off from their employment.

The timing of the layoff and the selection of all six of the core crew members, including the foreman, and the expressed displeasure of Area Manager Miller toward complainants' safety concerns and his participation in the layoff selection process is sufficient nexus to demonstrate a prima facie case.

Respondent asserts that the layoff was a normal reduction in force mandated by business necessity as the W058 project came to a conclusion. Respondent further asserts that complainants O'Leary, Stull, Killen, and Holbrook were selected for layoff by means of the regularly established procedure and that complainants Nicacio, Phillips and Walli terminated their employment voluntarily by requesting to be part of the layoff.

According to respondent, on June 4, 1997, upper management gave General Foreman Nichols the number of pipe fitters that were to be laid off on Friday, June 6, 1997. The need for a layoff of pipe fitters as the project wound down had been discussed for weeks beforehand. Other than Foreman Walli, the individuals to be selected for layoff was done by General Foreman Nichols according to past practice. The collective bargaining agreement is silent on the issue of layoffs and says only that "continuing employment is contingent upon the skill productivity and qualification of the employee." It is undisputed that the usual procedure involves the general foreman and the crew foremen (both of whom are union members) selecting individuals for layoff based on the needs of the work assigned and the qualifications of the workers.

According to respondent, General Foreman Nichols prepared a preliminary list of employees to be laid off and presented it to the ten crew foremen, including Foreman Walli. The list consisted of complainants O'Leary, Stull, Killen and Holbrook plus apprentice Torres, T. Morgan, and B. Van Wechel, a total of seven individuals. None of the foremen expressed dissatisfaction with the list nor recommended that any other employee be laid off instead. According to respondent, when Walli, Nicacio and Phillips volunteered for layoff, they were substituted for Morgan and Van Wechel, who remained employed.

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Although respondent speaks extensively about "the layoff list" and changes in the list, no actual list was ever produced other than "Attachment 6" of the "Employee Concerns Investigation Report" prepared by Fluor Daniel employees Dora Valero and Mike Dickinson signed July 7, 1997, well after the fact. Further, respondent emphasizes the legitimate business need for the layoff of a number of employees, yet no actual number is ever specified other than stating that the 200 West job needed only 3 or 4 workers to complete. The lists presented in "Attachment 6" varied in size, and by General Foreman Nichols' own admission, during the June 5 meeting he asked for additional volunteers for layoff after he already had laid off one more employee than planned.

Again, although respondent witnesses maintain that only 3 or 4 crew were needed, time card records indicate that two days after the layoff the 200 West crew consisted of 6 workers who frequently worked overtime. The "Employee Concerns Investigation Report" provided and supported by respondent states that Valdez and Barcello were removed from the original list because they were

needed on the Facility Stabilization Project W-087; however, time card records indicate Valdez helped complete the 200W project.

Assistant Superintendent Doug Holbrook's position was purportedly eliminated, and he replaced complainant Walli as crew foreman. However, witness testimony and time records indicate that Holbrook only worked as crew foreman for 2½ weeks, at which time he was rehired as superintendent on a permanent basis. Holbrook was immediately replaced by Joe Herrin, who had been a welder's fire guard on the project.

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It should be made clear to all parties that the U.S. Department of Labor does not represent any of the parties in a hearing. The hearing is an adversarial proceeding in which the parties will be allowed an opportunity to present their evidence for the record. The Administrative Law Judge who conducts the hearing will issue a recommended decision to the Secretary based on the evidence, testimony, and arguments presented by the parties at the hearing. The Final Order of the Secretary will then be issued after consideration of the Administrative Law Judge's recommended decision and the record developed at the hearing, and will either provide for appropriate relief or dismiss the complaint.

Sincerely,

Richard S. Terrill
Acting Regional Administrator

cc: Chief Administrative Law Judge
John D. Wagoner, Manager, DOE Hanford
Tom Carpenter, Esq.
Charles MacLeod, Chief Counsel

Appendix 3

FLUOR DANIEL
Fluor Daniel Hanford, Inc.
P.O. Box 1000
Richland, WA 99352

Settlement Agreement Between Employers
Fluor Daniel Northwest, Inc. and
Terry Holbrook, Clyde Killen, Pete Nicacio,
Shane O'Leary, Dan Phillips,
James D. Stull, Randall J. Wallt
DOL Case No. 98-ERA-4

Fluor Daniel Northwest, Inc. (FDNW) and the above named seven Complainants agree to the following:

1. FDNW agrees to pay each of the Complainants $42,000.
2. This $42,000 per Complainant is not a "make whole" amount or based on any wage formula, rather it is for case settlement.
3. FDNW agrees to offer reinstatement of employment to each of the Complainants within two weeks of the signing of this Settlement Agreement.
4. FDNW agrees to pay Complainants' attorneys, the Government Accountability Project and Project on Liberty and the Workplace, a total of $40,000 in legal expenses.
5. FDNW and Complainants agree to work for U.S. Department of Labor (DOL) approval of this Settlement Agreement and FDNW will pay the designated amounts within two weeks of final DOL approval.
6. FDNW admits no wrongdoing of any kind by signing this Settlement Agreement.
7. Complainants agree DOL Case No. 98-ERA-4 is settled by the signing of this Settlement Agreement.

12007

Exhibit 1

8. Complainants agree that all disputes arising out of their employment with FDNW are settled by this Agreement as the purpose of this agreement is to dispose of all disputes between Complainants and FDNW. This Agreement constitutes a full and complete release of all claims made, or which could have been made, against FDNW, its officers, employees, or representatives with respect to the subject matter of DOL Case No. 98-ERA-4.

9. FDNW and Complainants agree that this Settlement Agreement is to be interpreted by federal law governing these DOL proceedings and as appropriate with the laws of the State of Washington.

Signed by FDNW and Complainants this 23rd day of February, 1998.

Complainants:

Terry Holbrook

Clyde Killen

Pete Nicacio

Shane O'Leary

Dan Phillips

James D. Stull

Randall J. Wall

For the Employer:

Joe D. Davis, President
Fluor Daniel Northwest, Inc.

Appendix 4

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, and DAVID FAUBION, Plaintiffs, v. FLUOR DANIEL, INC., a California corporation; FLUOR DANIEL HANFORD, INC., a Washington corporation; FLUOR DANIEL NORTHWEST, INC., a Washington corporation; JERRY NICHOLS, an individual and his marital community; DAVID FOUCAULT, an individual and his marital community; and JIM HOLLADAY, an individual and his marital community, Defendants.	Case No. 99-2-01250-7 DECLARATION OF ROBERT M. CAROSINO IN SUPPORT OF DEFENDANTS' MEMORANDUM OPPOSING PLAINTIFFS' MOTION TO COMPEL CERTAIN DEPOSITION TESTIMONY OF DAVID FOUCAULT

I, ROBERT M. CAROSINO, having first-hand knowledge of the subject matter of this declaration and being competent to testify, declares, under penalty of perjury, as follows:

1. I am an attorney. I am employed by the United States Department of Energy ("DOE") in the Office of the General Counsel, Richland Operations Office. I am responsible for DOE's oversight of certain litigation involving its contractors, including Fluor Hanford, Inc. This case is one of the cases for which I am responsible.

OFFICE OF CHIEF COUNSEL
UNITED STATES DEPARTMENT OF ENERGY
RICHLAND OPERATIONS OFFICE
P.O. BOX 550 MSIN A4-52
RICHLAND, WA 99352
(509) 376-7311

EXHIBIT 16

2. Contractors such as Fluor Hanford are employed under the terms of a written contract. In general terms, the contract requires Fluor to provide certain services and requires DOE to pay the costs of contract compliance.

3. DOE's obligation to pay the costs associated with contract compliance includes costs, fees, judgments, and the like associated with some forms of litigation. Attached to this declaration, and incorporated in it by reference as Exhibit 1, is Paragraph H.38 of Contract DE-AC06-96RL13200, as modified October 1, 1999. This is the Insurance-Litigation and Claims article of the contract, which governs most of the litigation that DOE pays for under the contract.

4. As a matter of practice, and as required by the terms of Exhibit 1, Fluor Hanford is required to notify DOE whenever an action or claim is initiated against it. When it is notified of such a claim or action, DOE takes a close interest in claim handling and litigation practice. It retains a right of approval of outside counsel retained to represent the company; it is authorized to, and does in practice, coordinate with the company and its counsel in settling and/or defending the case or claim; it requires its contractors to periodically report to it on the status of, and any developments in, pending litigation; it retains a right of approval over settlements; and it may, in cases where more than one of its contractors are named in the same case, require all to agree to representation by common counsel.

5. DOE satisfies itself that its interests in contractor litigation are being adequately served by the contractor by periodic meetings attended by, among others, contractor counsel, DOE counsel, and any DOE or contractor personnel whose input is necessary for the parties to carry out this relationship. These meetings often involve the exchange of detailed information

about cases and claims, their values, and the contractor's plans for defense, settlement, or the like. Both DOE and, to my knowledge, its contractors, have historically viewed the exchanges that have occurred in these meetings as confidential.

6. It is DOE's practice to refuse to produce documents relating to these meetings and exchanges when asked to do so under the Freedom of Information Act. This practice has been upheld; *see Miller, Anderson, Nash, Yerk & Weiner v. U.S. Dept. of Energy*, 499 F. Supp. 767 (D.Or. 1980).

7. DOE's refusal to produce documents such as litigation plans prepared and submitted by its contractors has also been upheld. Attached to this declaration, and incorporated in it as Exhibit 2, is the decision of the Honorable Lorenzo F. Garcia, Magistrate Judge, in *Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, Misc. No. 96-37 MV/LFG (D.N.M. 1996), finding that such materials are privileged.

8. The basis for DOE's refusal to produce the information submitted to it under the Litigation and Claims Article is its belief that, as Judge Garcia said, "Both DOE and . . . [its contractor] . . . share a common interest in this litigation." Exhibit 2 at 5.

9. Fluor Hanford's contract contains additional provisions relating to "Whistleblower Actions." Attached to this declaration, and incorporated in it as Exhibit 3, is Paragraph H.40 of the contract, entitled Costs Associated with Whistleblower Actions.

10. Paragraph H.40 limits the circumstances under which DOE is required to take financial responsibility for costs associated with the unsuccessful defense of whistleblower claims. While DOE may not ultimately bear the costs associated with this sort of claim, its interest in its contractor's defense is no less common than its interest in any other form of

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litigation. This is because DOE has an interest in the appropriate resolution of whistleblower actions, takes financial responsibility in the case of successful defense of such claims, and has discretion under the contract, to fund the defense even after an "adverse determination" has been made. As a practical matter, DOE would probably be less inclined to approve reimbursement of costs associated with such a claim in the absence of even more detailed disclosures and justifications than it would require with respect to other forms of litigation.

11. DOE has not decided whether all of Fluor's Pipefitter-related costs will be reimbursed under the contract. At the present time, no dispute or conflict exists between DOE and the contractor regarding this issue.

12. I believe that my ability to carry out my responsibilities for oversight of Fluor Hanford litigation would be harmed if the common interest of DOE and its contractor in this litigation is not recognized. We have always expected that the communications necessary to carry out these functions would be held in confidence by both DOE and the contractor. As a result, we have expected that the contractor would provide full and open reports to us regarding the progress of the litigation, its strengths and its weaknesses. Obviously, we would not have the same level of confidence in the contractor's disclosures if we felt that the contractor had to hold back for fear that its comments and reports would be subject to discovery.

I declare under penalty of perjury under the laws of the State of Washington that to the best of my knowledge the foregoing is true and correct.

DATED this 28th day of March, 2000.

Robert M. Carosino

OFFICE OF CHIEF COUNSEL
UNITED STATES DEPARTMENT OF ENERGY
RICHLAND OPERATIONS OFFICE
P.O. BOX 550 MSIN A4-52
RICHLAND, WA 99352
(509) 376-7311

Appendix 5

Statement of
Richard E. Moberly
Assistant Professor of Law
Cline Williams Research Chair
University of Nebraska College of Law

Before the
Subcommittee on Workforce Protections
Committee on Education and Labor
United States House of Representatives

Hearing on
Private Sector Whistleblowers: Are There Sufficient Legal Protections?

May 15, 2007

Madam Chair and Members of the Subcommittee:

Thank you for the invitation to appear before you to talk about whether there are sufficient legal protections for private-sector whistleblowers. I teach and write about whistleblower protection and I am honored to talk with you about this topic.

The short answer to the question this hearing presents is that there are *many* protections for whistleblowers, but it is doubtful whether there are *sufficient* protections. In this testimony, I hope to explain the ways in which current protections fall short by focusing on four primary areas:

1. The importance of encouraging and protecting whistleblowers in the private sector;

2. A general description of private-sector whistleblower protection, particularly under federal law;

3. Examples of whistleblower protection issues under the Sarbanes-Oxley Act of 2002, to illustrate problems with the federal protection of whistleblowers; and

4. Areas in which federal whistleblower protection should be more closely examined.

1. Whistleblowers Provide a Public Benefit

A rationale often provided for protecting whistleblowers is one of "fairness": whistleblowers take a great risk by disclosing information about corporate misconduct, and it is unfair that they should be retaliated against because of their actions. While this justification has resonance, I want to focus on another rationale: whistleblowers provide a substantial public benefit.

Private sector whistleblowers enhance corporate monitoring and improve corporate law enforcement. We need whistleblowers to report corporate misconduct in order to supplement the traditional methods of monitoring corporations. Employees know more than others who might discover corporate wrongdoing (such as the government or even an independent board of directors) because they are on-the-ground inside the corporation and, collectively, know everything about its inner workings.[1] In fact, even with few corporate or legal incentives provided to whistleblowing employees, roughly one-third of fraud and other economic crimes against businesses are reported by whistleblowers.[2]

Furthermore, almost all the benefits of a whistleblower's disclosure go to people other than the whistleblower: society as a whole benefits from increased safety, better health, and more

[1] For a more complete discussion of the importance of employees as corporate monitors, see Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1116-25.

[2] *See* Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 Wash. U. L.Q. 357, 365 n.37 (2003) (citing study reported in Jonathan D. Glater, *Survey Finds Fraud's Reach in Big Business*, N.Y. Times, July 8, 2003, at C3).

efficient law enforcement. However, most of the costs fall on the whistleblower. There is an enormous public gain if whistleblowers can be encouraged to come forward by reducing the costs they must endure. An obvious, but important, part of reducing whistleblowers' costs involves protecting them from retaliation after they disclose misconduct.

2. Federal Whistleblower Protection for the Private Sector

Despite the importance of protecting whistleblowers from retaliation, no uniform whistleblower law exists. Rather, protections for private sector whistleblowers consist of a combination of federal and state statutory protections, as well as state common law protections under the tort of wrongful discharge in violation of public policy. These uneven protections are often rightly labeled a "patchwork," because of the wide variance in the scope of protections each provides.

a. Narrow Substantive Protections for a Broad Range of Industries

Federal protections for whistleblowers take an ad-hoc, "rifle-shot" approach. Rather than protect any employee who reports any illegal activity, federal statutes only protect whistleblowing related to a specific topic or statute, and then only if the whistleblower works for an employer covered by the statute.

For example, the Surface Transportation Assistance Act of 1982 only protects whistleblowing related to the safety of commercial motor vehicles.[3] The only employees who are protected are drivers of commercial motor vehicles, mechanics, or freight handlers who directly affect commercial motor vehicle safety in the course of their employment.[4]

Even if the whistleblower reports the right type of illegal activity, statutes vary on whether the whistleblower will be protected depending upon *how* the employee blew the whistle. Some statutes appear to only protect employees who participate in proceedings related to violations of particular statutes,[5] while others also protect employees who affirmatively report illegal conduct[6] or who refuse to engage in illegal activity.[7] Moreover, some statutes require reports to be made externally to the government,[8] while others will protect whistleblowers who report misconduct to their supervisors.[9]

These types of nuanced protections exist for a broad range of industries. More than 30 separate federal statutes provide anti-retaliation protection for private-sector employees who engage in protected activities in a variety of areas, including workplace safety, the environment, and public health. Statutes protect employees who disclose specific violations in certain safety-

[3] *See* Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a).
[4] *See id.*
[5] *See, e.g.*, Clean Air Act of 1977, 42 U.S.C. § 7622(a); Solid Waste Disposal Act of 1976, 42 U.S.C. § 6971(a).
[6] *See* International Safe Container Act, 46 U.S.C. § 1506(a).
[7] *See, e.g.*, Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105(a); Energy Reorganization Act, 42 U.S.C. § 5851(a)(1)(B).
[8] *See* Records and Reports on Monetary Instruments Transactions, 31 U.S.C. § 5328.
[9] *See* Federal Mine Safety and Health Act, 30 U.S.C. § 815(c).

sensitive industries, such as the mining,[10] nuclear energy,[11] and airline industries.[12] Private sector employees may be protected if they disclose corporate fraud on the government[13] or on shareholders.[14] The list of protected employees ranges from the expected—employees who make claims under anti-discrimination statutes such as Title VII[15]—to the surprising—employees who participate in a proceeding regarding drinking water or who report an unsafe international shipping container.[16]

b. A Wide Variety of Procedural Requirements

The procedural requirements for whistleblowers to file a claim are as varied as the activities protected by the statute. Some statutes permit whistleblowers to file claims directly in federal court.[17] Others require whistleblowers to file claims with administrative agencies, such as the Department of Labor. In fact, 14 statutes require whistleblowers to file with the Occupational Safety and Health Administration within the Department of Labor. Even among these OSHA statutes, the procedures vary depending on the type of claim. Some statutes, like the Occupational Safety and Health Act, permit only the agency to investigate and prosecute claims of retaliation on an employee's behalf. Others permit employees to pursue their own claims by requesting an administrative investigation, from which appeals can be made to an administrative law judge, then an administrative review board, and ultimately to a federal court of appeals. The Sarbanes-Oxley Act of 2002 has the additional procedural nuance of requiring whistleblowers to first file a claim with OSHA, but then permitting whistleblowers to withdraw their claim and file in federal district court if the agency does not complete its review within 180 days.

Depending on the statute invoked by the whistleblower, the statute of limitations for claims can be 30 days,[18] 60 days,[19] 90 days,[20] or 180 days.[21] The statute of limitations for retaliation under employee discrimination statutes can reach 300 days.[22]

The burdens of proof differ as well. Some retaliation cases require proof that the adverse employment action taken against the employee would not have occurred "but for" the employee's protected conduct. Others require only that the protected activity play a "motivating," or even less onerously, a "contributing" factor in the adverse employment action. Statutes vary on the level of proof required for employers to rebut a *prima facie* case of

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[10] *See* Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c).
[11] *See* Energy Reorganization Act, 42 U.S.C. § 5851.
[12] *See* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121.
[13] *See* False Claims Act, 31 U.S.C. § 3730(h).
[14] *See* Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A.
[15] *See* Equal Employment Opportunity Act (Title VII), 42 U.S.C. § 2000e-3(a).
[16] *See* Safe Drinking Water Act, 42 U.S.C. § 300j-9; International Safe Container Act, 46 U.S.C. § 1506.
[17] *See, e.g.*, Federal Deposit Insurance Act, 12 U.S.C. § 1831j.
[18] *See, e.g.*, Solid Waste Disposal Act, 42 U.S.C. § 6971.
[19] *See, e.g.*, International Safe Container Act, 46 U.S.C. § 1506.
[20] *See, e.g.*, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A.
[21] *See, e.g.*, Energy Reorganization Act of 1974, 42 U.S.C. § 5851.
[22] *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 626.

retaliation, from preponderance of the evidence to clear and convincing evidence that the employer would have made the same decision absent any protected activity.

c. Many, but not Sufficient, Protections

Suffice it to say, one would never create this system from scratch. Instead, this network of protections has evolved on an ad hoc basis in order to support specific statutory schemes. Whether a whistleblower is protected depends upon the employer for whom the employee works, the industry in which the employee works, the type of misconduct reported, the way in which the employee blew the whistle, and, under some statutes, the willingness of administrative agencies to enforce the law.

Indeed, given this grab bag of statutes, rank-and-file employees likely cannot determine the protection available to them without consulting an attorney before blowing the whistle. Not surprisingly, surveys demonstrate that most employees are unaware of the protections they may (or may not) receive should they report wrongdoing.[23] If employees are not aware of or do not understand their protections, then these anti-retaliation provisions are not doing their job of encouraging employees to come forward with information about misconduct. Society cannot gain the enormous public benefits from whistleblowing. Thus, while there may be *many* legal protections for whistleblowers, it is doubtful whether there are *sufficient* protections.

3. The Sarbanes-Oxley Example

One statute that might have fixed some of these problems was the Sarbanes-Oxley Act of 2002, which Congress passed in response to corporate scandals involving Enron, WorldCom, and others. Under Sarbanes-Oxley, employees of publicly-traded companies who report fraudulent activity may bring claims against any person who retaliates against them as a result of their disclosure. By protecting employees at publicly-traded companies, the hope was to provide protections to a much broader range of employees than had previously been protected by statutes focusing primarily on particular industries. At the time it was passed, many whistleblower advocates and legal commentators expected that Sarbanes-Oxley would provide the broadest, most comprehensive coverage of any whistleblower provision in the world.

a. Whistleblowers Rarely Win

These expectations have not been realized: employees rarely win Sarbanes-Oxley cases. I recently completed an empirical study of all Department of Labor Sarbanes-Oxley determinations during the first three years of the statute, consisting of over 700 separate decisions from administrative investigations and hearings.[24] Only 3.6% of Sarbanes-Oxley whistleblowers won relief through the initial administrative process at OSHA that adjudicates such claims, and only 6.5% of whistleblowers won appeals in front of a Department of Labor

[23] TERANCE D. MIETHE, WHISTLEBLOWING AT WORK: TOUGH CHOICES IN EXPOSING FRAUD, WASTE, AND ABUSE ON THE JOB 54 (1999).

[24] *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. ___ (forthcoming 2007), *available at* http://ssrn.com/abstract=977802.

Administrative Law Judge. That's 13 whistleblowers at the OSHA level, and 6 at the ALJ level. Moreover, more recent statistics from OSHA indicate that not a single Sarbanes-Oxley whistleblower won a claim before OSHA in Fiscal Year 2006 – out of 159 decisions made by the agency during that year.

This low win rate for whistleblowers has two primary causes. First, administrative decision-makers focus an extraordinary amount of attention on whether the whistleblower is the "right" type of whistleblower. Did the whistleblower disclose the "right" type of misconduct, to the "right" type of person? Did the whistleblower work for the "right" type of company? Did the whistleblower provide a complaint precisely within the 90-day statute of limitations? ALJs determined that over 95% of Sarbanes-Oxley whistleblower cases failed to satisfy one or more of these questions as a matter of law. Thus, very few whistleblowers were actually provided the opportunity to demonstrate that they were the subject of retaliation.

Second, at the initial OSHA investigative level, when OSHA found that an employee's claim actually satisfied all of Sarbanes-Oxley's legal requirements, OSHA still found for the employee only 10% of the time. This low win rate seems surprising, because Sarbanes-Oxley purposefully presents a very low burden of proof for employees once their *prima facie* case is met.

By themselves, these statistics should give us pause, given the high expectations regarding the potential of Sarbanes-Oxley to provide relief to whistleblowers whose employers retaliate against them. But, as important, Sarbanes-Oxley's implementation illustrates broader problems with the federal ad hoc approach to whistleblower protection.

b. Problems with Whistleblower Protection

Boundary Problems. First, by only protecting certain types of disclosures and certain types of employees, federal law puts enormous pressure on whether the whistleblower's disclosure was the "right" kind of disclosure or the employee is the "right" type of employee. Not only is this difficult for employees to predict ahead of time, but it also requires line-drawing by decision-makers that can narrow the scope of the protections more restrictively than intended by Congress.

Sarbanes-Oxley demonstrates this problem. The Act protects disclosures related to certain federal criminal fraud provisions as well as rules and regulations related to securities requirements. Also, the Act only protects employees of publicly-traded companies. My study revealed that administrative decision-makers frequently focused on these two legal requirements to dismiss cases, and often by reading the statute's boundaries very narrowly. For example, Sarbanes-Oxley protects any disclosure related to mail or wire fraud, without qualification. However, the DOL's Administrative Review Board has ruled that the disclosure of mail or wire fraud in general is not sufficient; the fraud disclosed by a whistleblower must be "of a type that would be adverse to investors' interests."[25] Similarly, ALJs have ruled that Sarbanes-Oxley does not protect employees of privately-held subsidiaries of publicly-traded companies unless the employee can pierce the corporate veil between the companies or demonstrate that the publicly-

[25] *See* Platone v. FLYi, Inc., No. 04-154, at 15 (ARB Sept. 29, 2006).

traded company actively participated in the retaliation.[26] In this and other instances, such narrow interpretations leave good faith whistleblowers without protection if they report the wrong type of fraud or work for the wrong type of company.

Procedural Hurdles. Procedural hurdles loom large for whistleblowers. For example, ALJs dismissed *one-third* of Sarbanes-Oxley cases because the whistleblower failed to satisfy Sarbanes-Oxley's relatively short 90-day statute of limitations. As I noted earlier, the limitations period of other federal whistleblower protection statutes ranges from 30 to 300 days. Short filing periods can have drastic consequences. Because most employees who file whistleblower claims allege that they lost their jobs,[27] additional time to file claims would provide whistleblowers the ability to first take care of pressing responsibilities, such as finding another job and dealing with the upheaval of losing a primary source of income, before ultimately locating a competent attorney to file a claim.

Investigating Claims. Third, retaliation cases are highly fact-intensive cases that require resources, time, and expertise. Requiring an administrative investigation prior to an adjudicatory hearing may not efficiently utilize government resources. For example, when Sarbanes-Oxley was added to OSHA's responsibilities, OSHA did not receive any additional funding for cases that now consist of approximately 13% of OSHA's caseload. This lack of resources has led to lengthy delays to resolve cases: although the Act's regulations mandate that OSHA complete its investigation within 60 days, the average length of a Sarbanes-Oxley investigation in Fiscal Year 2005 was 127 days. Also, OSHA had primarily dealt with environmental and health and safety statutes prior to Sarbanes-Oxley. Asking the agency to discern the nuances of securities fraud seems well beyond its traditional scope. Moreover, OSHA investigators who must examine cases involving 14 different laws may not adequately differentiate among provisions that often provide for different burdens of proof and substantive protections. Add to that internal OSHA procedures that did not give the whistleblower a full and fair opportunity to rebut an employer's allegations, and it should not be surprising that few Sarbanes-Oxley whistleblowers have been successful at the OSHA investigative stage of their claim. In short, the Sarbanes-Oxley results call into question OSHA's utility as an investigative body for whistleblower claims.

4. Areas to Examine

There are two main types of questions to consider going forward. First, if you are satisfied with the current "rifle-shot" approach to whistleblower protection, are there ways in which it can be improved? Second, if the current model is not satisfactory, what would a different model look like?

a. Improving the Current System

Clarifying Broad Protections. In areas such as Sarbanes-Oxley, in which it can be demonstrated that administrative decision-makers or courts have narrowly read the protections

[26] *See* Bothwell v. Am. Income Life, No. 2005-SOX-57, at 8 (Dep't of Labor Sept. 19, 2005); Hughart v. Raymond James & Assoc., Inc., 2004-SOX-9, at 44 (Dep't of Labor Dec. 17, 2004).

[27] The study found that 81.8% (378/462) of Sarbanes-Oxley Complainants whose allegation regarding retaliation was discernable alleged that they were fired from their jobs as retaliation.

that Congress already has granted, Congress could clarify the statute's broad reach. Passing legislation that clearly repudiates decisions narrowing an act's scope could alleviate the tendency of decision-makers to draw restrictive legal boundaries in whistleblower cases. Congress has repeatedly taken such an approach for federal employee whistleblowers when administrative and judicial rulings undermined the broad protections of the Civil Service Reform Act and, more recently, the Whistleblower Protection Act.[28] Congress should similarly examine federal statutory protections for private sector whistleblowers.

Lengthening the Statute of Limitations. The short statutes of limitations that currently exist are unrelated to the goals of whistleblower statutes and serve no real purpose other than to trip up unsuspecting whistleblowers *after* they have already taken the serious risk of coming forward with information about misconduct. Increasing statutes of limitations to at least 180 days would be an easy, but nonetheless extremely helpful, solution.

Improving Transparency. The adjudication of whistleblower claims should be more transparent. For example, OSHA does not publish any of its statistics or decision-letters. I received them by asking OSHA directly and by submitting a Freedom of Information Act (FOIA) request. No information about monetary awards or settlements are publicly available and OSHA denied my FOIA request for this information. The Office of Administrative Law Judges puts its decisions on the internet, but does not compile any statistics about its results. Statutory requirements that employers post notices about the available whistleblower protections are inconsistent: some statutes have them, others do not. The lack of meaningful, public information about whistleblower provisions and cases interpreting them fails to provide employees sufficient guidance regarding whether they will be protected if they blow the whistle, and also undermines the public discourse about whether these protections are effective. The decisions, and the decision-making process, of administrative agencies need more public oversight.

b. Implementing New Protections

The Importance of Defining Legal Boundaries. The problems with the current system can inform decisions on the areas on which one should focus when implementing new protections. Given the problems with the current narrow boundaries of many whistleblower provisions, a new whistleblower law should protect whistleblowers for disclosing a broad range of illegal activities. But, as with everything, the devil is in the details. Should whistleblowers who report *any* illegal activity be protected? Or only activity that is illegal under federal law or some subset of federal laws? Should we require whistleblowers to be correct that the activity they report is, in fact, illegal, or should we protect whistleblowers who reasonably disclose misconduct in good faith, even if the misconduct is not actually illegal? Should we require whistleblowers to report illegal activity externally to a law enforcement officer, or should we protect whistleblowers who report misconduct internally to their supervisor?

I am quite confident you understand that legal definitions and boundaries matter—it is what you debate everyday. My point is that for whistleblower protections in particular, the evidence demonstrates that the boundaries you draw will have real bite, for two reasons. The

[28] *See* Whistleblower Protection Enhancement Act of 2007, H.R. 985, 110th Cong. (2007).

first relates to the nature of whistleblowing: whistleblowers take real risks, and the current topic-by-topic, ad hoc approach to protecting whistleblowers does not provide employees sufficient certainty regarding their protections as they decide whether to blow the whistle. Second, statutory boundaries particularly matter for whistleblower protections because of the manner in which whistleblower laws currently are administered: narrow protections only encourage, or in some instances, require administrative and judicial decision-makers to define whistleblowers out of protected categories. Agencies and courts currently spend too much time debating whether this is the "right" type of employee, the "right" type of report, or the "right" type of illegal activity, and not enough effort determining whether retaliation occurred. Broadly defining the legal boundaries of any new protection may enable decision-makers to focus on the important factual question of causation: was this employee retaliated against for reporting something illegal?

Providing Structural Disclosure Channels. Finally, I urge you to examine other types of encouragement for whistleblowers. For example, in the Sarbanes-Oxley Act of 2002, Congress required publicly-traded companies to implement a whistleblower disclosure channel directly to the company's board of directors. This internal reporting mechanism can supplement anti-retaliation protections because it encourages reporting directly to individuals with the authority and responsibility to respond to information about wrongdoing. Procedural and structural modifications that encourage effective employee whistleblowing should be considered along with any reform of anti-retaliation protections.[29]

5. Conclusion

From one perspective, whistleblowers demonstrate that employees can be effective as corporate monitors. At great risk to their careers, a few employee whistleblowers bravely attempt to expose wrongdoing at corporations involved in misconduct, such as Enron, WorldCom, Global Crossing, and others.

Viewed differently, however, such isolated scandals also illustrate the difficulty of relying upon employees to function as effective corporate monitors. The financial misconduct at Enron and other companies lasted for years before being revealed publicly. Countless lower-level employees necessarily knew about, were exposed to, or were involved in the wrongdoing and its concealment—but few disclosed it, either to company officials or to the public. Thus, while whistleblowers who reveal corporate misconduct demonstrate employees' potential to monitor corporations, the fact that so few have come forward also confirm that this potential often is not fully realized.

The challenge for policy-makers is to provide sufficient encouragement and protection for employees so that they can fulfill their essential role of corporate monitoring. Without employees willing to blow the whistle on corporate misconduct, we lose one key aspect of society's ability to monitor corporations effectively. Thorough and comprehensive statutory whistleblower protections will encourage private-sector whistleblowers and should be an integral part of our corporate law enforcement effort.

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[29] *See* Moberly, *supra* note 1, at 1141-78 (discussing the importance of implementing effective whistleblower disclosure channels).